No. 93-87

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

DANELLA CONSTRUCTION CORPORATION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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July 16, 1993

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Can a federal court vacate a final and binding arbitration award on a non-statutory basis when confirmation proceedings are governed by the Federal Arbitration Act?

RULE 29.1 LIST

The parent company of MCI Telecommunications Corporation is MCI Communications Corporation. MCI Telecommunications Corporation has no subsidiaries other than wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner MCI Telecommunications Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-titled proceeding on April 20, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit has not been reported, and is reprinted at Appendix A, *infra.*

The memorandum opinion of the United States District Court for the Eastern District of Pennsylvania (Buckwalter, J.) has not been reported, and is reprinted at Appendix B, *infra.*

JURISDICTION

The opinion of the Court of Appeals for the Third Circuit, reversing the decision of the District Court, and directing the District Court to enter judgment confirming the arbitration award in favor of Danella Construction Corporation, was entered on April 20, 1993. MCI's timely Petition for Rehearing was denied by the Court of Appeals for the Third Circuit on May 20, 1993.

The jurisdiction of this Court to review the opinion of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The United States (Federal) Arbitration Act of 1925, Sections 1, 2, 3, 4, 9, 10, 11, 12 and 13. 9 U.S.C. §§ 1-4, 9-13 (1964). The text of these provisions is set forth in Appendix H, *infra*.

STATEMENT OF THE CASE

In 1986, MCI Telecommunications Corporation ("MCI"), a Delaware corporation, hired Danella Construction Corporation ("Danella"), a Pennsylvania corporation, to install fiber optic cable in Louisiana. After discovering that Danella was not licensed to perform construction work in Louisiana, MCI terminated the contract. Both parties asserted breach and claimed damages.

The contract between MCI and Danella contained the following arbitration clause:

> Any dispute or disagreement arising between the Contractor and MCI in connection with this Contract . . . shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association of the State of New York then in effect on the date that such notice is given. The decision of the arbitrator(s) shall be final and binding upon the parties. Each Party shall bear the cost of preparing and presenting

> its case. The cost of the arbitration, including fees and expenses of the arbitrator(s), will be shared equally by the Parties unless the award otherwise provides.

MCI submitted a demand for arbitration to the American Arbitration Association ("AAA") on November 1, 1989;[1] Danella submitted a counterclaim. The parties selected a panel of arbitrators, submitted statements, participated in a hearing, and filed post-hearing briefs.

The arbitrators issued an award ("the Original Award") requiring Danella to pay MCI damages in the amount of $141,160.19, and miscellaneous costs in the amount of $142.50. Appendix E. Each of the three arbitrators signed the Original Award on July 2, 5 and 11, 1990 respectively. The executed Original Award was then mailed to the parties by the AAA. The Original Award stated that it was "in full settlement of all claims submitted to this Arbitration".

Danella filed a "Motion for Reconsideration" with the AAA, alleging substantive, not clerical, reasons why the award should be reconsidered. In the motion, Danella asserted that MCI had not suffered any damages, claimed that the award lacked a factual basis, and questioned the validity of damages that MCI had submitted. At the AAA's request, MCI submitted a response, asserting that once the arbitrators had issued the Original Award, their authority was terminated and they could not rule on Danella's Motion for Reconsideration. The AAA forwarded the motion papers to the arbitrators for their consideration.

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[1] MCI's demand followed Danella's complaint for breach of contract filed in the Court of Common Pleas for Montgomery County, Pennsylvania, which was removed to the United States District Court for the Eastern District of Pennsylvania. That action was dismissed without prejudice upon the agreement of the parties to submit the matter to arbitration.

On August 20, 1990, the AAA forwarded to the parties a "Second Award", executed by the arbitrators. Appendix F. It completely revised and reversed the Original Award, ordering MCI to pay Danella $141,160.19, but again requiring Danella to pay $142.50 in miscellaneous costs.

Five months later, on January 17, 1991, Danella filed a petition seeking confirmation of the Second Award in the Court of Common Pleas for Montgomery County, Pennsylvania. MCI removed the action to the District Court for the Eastern District of Pennsylvania[2] and sought confirmation of the Original Award. The parties filed cross-motions for summary judgment. As exhibits to its motion for summary judgment, Danella appended two facsimiles, allegedly communications between the arbitrators and the AAA. MCI urged that these documents were inadmissible on the grounds that they were hearsay, and constituted statements by the arbitrators impeaching their own award.

The district court found that the matter was governed by the Federal Arbitration Act ("the Act"). Appendix B at p. 11a. Finding that the parties had agreed to abide by the AAA rules, the court stated that neither these rules nor sections 9 through 12 of the Act permitted a motion for reconsideration to be presented to the arbitrators. Appendix B at pp. 12a-13a. Moreover, the district court found, "Danella never filed an application with this court under 9 U.S.C. § 11." Appendix B at p. 10a. Accordingly, the district court vacated the Second Award pursuant to section 10(d)[3] of the Act and confirmed the

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[2] Jurisdiction over this matter in the district court was based on diversity pursuant to 28 U.S.C. § 1332.

[3] Public Law 101-552, Sec. 5, 101 Stat. 2745, November 15, 1990, redesignated subsection (d) of section 10 as paragraph (4), subsection (a) of section 10. See, 9 U.S.C.A. § 10 (West. Supp. 1993). Appendix H at p. 45a.

Original Award pursuant to section 9. Appendix B at p. 13a.

The Third Circuit reversed and remanded with instructions to confirm the Second Award. In an unpublished opinion, the appeals court relied on the common law doctrine of *functus officio* and its exception, namely that the existence of a "clerical error" rendered the award subject to modification or revision by the arbitrators. The court held:

> The record is clear that when the first award was typed, someone inadvertently failed to follow the arbitrators' award and transposed the identification of the parties. This is a clerical error, and one which the arbitrators had authority to correct, whether under the doctrine of *functus officio* or its "clerical mistake" exception. We will reverse the order of the district court and remand for it to confirm the corrected award in favor of Danella.

Appendix A at p. 6a.

The Court of Appeals' opinion contains *no* holding or other determination under the Act, only mentioning in a footnote that Danella could have filed an action pursuant to section 11 of the Act as an alternative to its Motion for Reconsideration. Appendix A at p. 3a. The opinion relied solely on the two facsimiles submitted by Danella and objected to by MCI.

MCI sought rehearing before the Third Circuit panel, which was denied. On MCI's motion, the Third Circuit granted a stay of the issuance of the mandate through July 19, 1993.

REASONS FOR GRANTING THE WRIT

The Federal Arbitration Act governs the confirmation, vacatur, correction and modification of arbitration awards arising out of contracts involving interstate commerce. This Court, as well as every federal circuit that has con-

sidered the question, has stated that court review of a final and binding arbitration award is limited by the Act. The Third Circuit is the only appellate court that has disregarded the statute, vacating a final and binding award that is clear and unambiguous on its face, and confirming a subsequent award allegedly "corrected" by the arbitrators, despite clear lack of statutory authority. That holding conflicts with this Court's decisions, as well as those of the circuit courts, concerning judicial review of arbitration awards, and raises a fundamental federal question concerning the construction and application of sections 9, 10, 11 and 12 of the Act.

I. THE THIRD CIRCUIT EXCEEDED THE STATUTORY AUTHORITY OF THE FEDERAL COURTS

This Court has frequently stated that the scope of judicial review of arbitration awards is limited by the Act.[4]. The plain and unambiguous language of section 9 of the Act states that, when presented with an award for confirmation, the court must confirm "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." 9 U.S.C. § 9.

Numerous circuit courts have repeatedly recognized the limits imposed by section 9: confirmation can only be denied if an award is vacated, modified or corrected in accordance with the terms of the Act.[5] Here, however,

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[4] *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985); *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 (1956); *Wilko v. Swan*, 346 U.S. 427, 436 (1953), *overruled on other grounds, Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *cf. United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987) (court review of arbitrator's decision on grievance under collective-bargaining agreement is limited).

[5] *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 820 (5th Cir. 1993); *Domino Group, Inc. v. Charlie Parker Memorial Found.*, 985 F.2d 417, 420 (8th Cir. 1993); *Colonial Penn Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327, 333 (3d Cir. 1991); *Marshall v. Green Giant Co.*,

the Third Circuit ignored section 9, and exceeding its statutory authority, vacated the Original Award.[6] The ruling rests on three fundamental errors.

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942 F.2d 539, 550 (8th Cir. 1991); *Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co.*, 918 F.2d 1215, 1218 (5th Cir. 1990); *Forsythe Int'l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1020, 1022 (5th Cir. 1990); *Antwine v. Prudential Bache Sec., Inc.*, 899 F.2d 410, 413 (5th Cir. 1990); *Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l, Ltd.*, 888 F.2d 260, 264-65 (2d Cir. 1989); *Cullen v. Paine, Webber, Jackson & Curtis, Inc.*, 863 F.2d 851, 854 (11th Cir. 1989), *cert. denied*, 490 U.S. 1107 (1989); *Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis*, 849 F.2d 264, 267 (7th Cir. 1988); *Ottley v. Schwartzberg*, 819 F.2d 373, 375 (2d Cir. 1987); *Foster v. Turley*, 808 F.2d 38, 42 (10th Cir. 1986); *Lafarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1338 (9th Cir. 1986); *Taylor v. Nelson*, 788 F.2d 220, 225 (4th Cir. 1986); *French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F.2d 902, 906 (9th Cir. 1986); *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 749 (8th Cir. 1986), *cert. denied*, 476 U.S. 1141 (1986); *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 174-76 (2d Cir. 1984); *Sperry Int'l Trade, Inc. v. Government of Israel*, 689 F.2d 301, 304 (2d Cir. 1982); *Shearson Hayden Stone, Inc. v. Liang*, 653 F.2d 310, 312-13 (7th Cir. 1981); *Revere Copper & Brass, Inc. v. Overseas Private Inv. Corp.*, 628 F.2d 81, 83 (D.C. Cir. 1980), *cert. denied*, 446 U.S. 983 (1980); *Diapulse Corp. v. Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980); *Marion Mfg. Co. v. Long*, 588 F.2d 538, 542 (6th Cir. 1978); *Andros Compania Maritima v. Marc Rich & Co.*, 579 F.2d 691, 703-704 (2d Cir. 1978); *National R.R. Passenger Corp. v. Chesapeake & O. Ry. Co.*, 551 F.2d 136, 141-42 (7th Cir. 1977); *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424, 429-32 (2d Cir. 1974); *Office of Supply v. New York Navigation Co.*, 469 F.2d 377, 379 (2d Cir. 1972); *Saxis S.S. Co. v. Multifacs Int'l Traders, Inc.*, 375 F.2d 577, 581-82 (2d Cir. 1967); *South E. Atl. Shipping Ltd. v. Garnac Grain Co.*, 356 F.2d 189, 191, 193 (2d Cir. 1966); *San Martine Compania de Navegacion v. Saguenay Terminals Ltd.*, 293 F.2d 796, 800-02 (9th Cir. 1961).

[6] By ordering the district court to confirm the Second Award, the circuit court necessarily vacated the Original Award, again without reference to the Act.

A. The Third Circuit Violated the Terms of the Arbitration Agreement

First, the Third Circuit expanded the arbitration panel's authority beyond the limits set by the parties' agreement. MCI and Danella agreed to arbitration that would result in a "final and binding" award.[7] Once the arbitrators had issued the Original Award, their authority came to an end.[8] Pursuant to either the Act[9] or the common law doctrine of *functus officio*, issuance of the Original Award terminated the arbitrators' authority; any actions taken thereafter were legal nullities.

But Danella took exception to the final and binding award and asked the arbitrators to reconsider[10], even

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[7] Under the contract, the Original Award was "final and binding". On its face, the Original Award stated that it was "in final settlement of all issues submitted by the parties to this Arbitration". Appendix D.

[8] *Domino Group*, 985 F.2d at 420; *Trade & Transport, Inc. v. Natural Petroleum Charterers, Inc.*, 931 F.2d 191, 195 (2d Cir. 1991); *Colonial Penn*, 943 F.2d at 331; *Ottley*, 819 F.2d at 376; *McClatchy Newspapers v. Central Valley Typographical Union*, 686 F.2d 731, 734 (9th Cir. 1982), *cert. denied*, 459 U.S. 1071 (1982); *American Centennial Ins. Co. v. Arion Ins. Co.*, No. 88 Civ. 1665, 1990 U.S. Dist. LEXIS 4209 (S.D.NY. April 13, 1990); *Proodos Marine Carriers Co. v. Overseas Shipping and Logistics*, 578 F. Supp. 207, 211 (S.D.N.Y. 1984); *A/S Siljestad v. Hideca Trading, Inc.*, 541 F. Supp. 58, 61 (S.D.N.Y. 1981).

[9] The district court found that the arbitration agreement here is subject to the Act, as the underlying contract involved interstate commerce. Appendix B. In their pleadings and motion papers before the district court, both parties referred to the Act. Section 10(a)(4) of the Act incorporates at least part of the doctrine of *functus officio* by authorizing vacatur of an award where the arbitrators have "exceeded their powers". 9 U.S.C. § 10(a)(4). Appendix H at p. 45a.

[10] This resort to litigation frustrates one of the underlying purposes of the Act, which is to avoid the "delay and cost of litigation".

though neither the AAA rules nor the Act provides for such a motion.[11] Although without authority, the arbitrators considered Danella's motion and issued the Second Award. By confirming the Second Award, the Third Circuit sanctioned the arbitrators' review of the motion for reconsideration, and effectively rewrote the parties' agreement to arbitrate. The Act gives the federal courts no such authority; Congress has required that courts rigorously enforce agreements to arbitrate, according to their terms.[12]

B. The Third Circuit Disregarded the Time Limitation on Motions to Modify, Correct or Vacate

"Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or

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H.R. Rep. No. 96, 68th Cong., 1st Sess. 2 (1924); *O.R. Securities, Inc. v. Profesesional Planning Assocs.*, 857 F.2d 742, 745 (11th Cir. 1988); *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1179 (11th Cir. 1981); *see Forsythe*, 915 F.2d at 1022; *Foster*, 808 F.2d at 42; *Diapulse*, 626 F.2d 1110; *Saxis*, 375 F.2d at 581; *cf. Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) ("[the] two goals of the Arbitration Act [are] enforcement of private agreements and encouragement of effective and speedy dispute resolution."); *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984) (prolonged litigation is one of the risks parties contracting for arbitration seek to eliminate); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983) ("[a] statutory policy of rapid and unobstructed enforcement of arbitration agreements"). Danella's actions have vitiated the purpose of the parties' arbitration agreement; three years have passed since issuance of the Original Award, and the matter is still in litigation.

[11] Sections 10 and 11 of the Act set forth the grounds for permissible post-award motions. 9 U.S.C. §§ 10, 11; *see The Hartbridge*, 57 F.2d 672, 673 (2d Cir. 1932). None of these grounds include errors of fact or law such as those presented in Danella's Motion for Reconsideration. *See Saguenay Terminals*, 293 F.2d at 802; *Saxis*, 375 F.2d at 582; *Garnac Grain*, 356 F.2d at 192.

[12] *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478 (1989); *Dean Witter*, 470 U.S. at 221; *Mitsubishi Motors*, 473 U.S. at 626.

delivered." 9 U.S.C. § 12. Every court of appeals that has addressed this issue has ruled that section 12 is a complete bar to a motion to vacate, modify or correct, after the statutory period has passed.[13] The Third Circuit's decision allowed Danella to present reasons for vacating the Original Award three months after the time limit in section 12 had expired.

Again, the Third Circuit simply ignored a clear directive of the Act.

C. The Third Circuit Relied on Impermissible Impeachment Evidence

The Third Circuit's decision, vacating the Original Award, turns on the text of two facsimiles purportedly sent by the arbitrators to the AAA, both submitted by Danella to impeach the Original Award. It is black letter law that arbitrators may not impeach their own awards.[14]

In considering whether to vacate an award under section 10, a court may not consider arbitrators' statements

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[13] *Domino Group*, 985 F.2d at 419; *Booth v. Hume Publishing, Inc.*, 902 F.2d 925, 929 at n.4 (11th Cir. 1990); *Cullen*, 863 F.2d at 853-54; *Professional Adm'rs Ltd. v. Kopper-Glo Fuel, Inc.*, 819 F.2d 639, 642 (6th Cir. 1987); *Taylor*, 788 F.2d at 225; *Florasynth*, 750 F.2d at 174-75; *Piccolo v. Dain, Kalman & Quail, Inc.*, 641 F.2d 598, 600 (8th Cir. 1981); *Drexel Burnham Lambert, Inc. v. Pyles*, 701 F. Supp. 217, 219 (N.D. Ga. 1988).

[14] See *Colonial Penn*, 943 F.2d at 333; *O.R. Securities*, 857 F.2d at 748; *Legion Ins. Co. v. Insurance General Agency, Inc.*, 822 F.2d 541, 542-44 (5th Cir. 1987); *Local P-9, United Food and Commercial Workers Int'l Union v. George A. Hormel & Co.*, 776 F.2d 1393, 1395 (8th Cir. 1985); *Hunt v. Mobil Oil Corp.*, 654 F. Supp. 1487, 1495-96 (S.D.N.Y. 1987); *Wood v. General Teamsters Union, Local 406*, 583 F. Supp. 1471, 1473 (W.D. Mich. 1984); *Fukaya Trading Co. v. Eastern Marine Corp.*, 322 F. Supp. 278, 279 (E.D. La. 1971); *Gramling v. Food Machinery & Chemical Corp.*, 151 F. Supp. 853, 860 (W.D.S.C. 1957); *Grudem Bros. Co. v. Great Western Piping Corp.*, 213 N.W.2d 920, 923-24 (Minn. 1973); *Jackson v. Government Employees Ins. Co.*, 417 Pa. Super. 543, 548, 612 A.2d 1071, 1074 (1992).

impeaching that award.[15] Any other rule would lead to endless litigation as to the "true" award.

The Circuit Court's opinion ignores the sole statutory ground under which a vacatur, modification or correction of an award is authorized—the narrowly drawn sections 10, 11 and 12 of the Act. By looking outside the Act, the Court of Appeals acted outside its statutory powers. This Court should grant certiorari to enunciate the rule that, when asked to confirm an arbitration award subject to the Federal Arbitration Act, the federal courts are to conduct themselves as Congress has prescribed in the Act [16]. This rule would affirm the plain language of sections 9, 10, 11 and 12 of the Act [17].

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[15] *Sperry Int'l Trade, Inc. v. Government of Israel*, 602 F. Supp. 1440, 1443 (S.D.N.Y. 1985); *Gramling*, 151 F. Supp. at 860-61. Even if the Third Circuit's decision is considered a modification or correction of the Original Award, the plain language of Section 11(a) authorizes modification of an award only for an "evident material mistake". 9 U.S.C. § 11. As the court makes such a determination, a "material mistake" must be made "evident" to the court. *See, e.g., Transnitro, Inc. v. M/V Wave*, 943 F.2d 471 (4th Cir. 1991) (remanding to district court for modification of incorrect expense awarded, where evident); *Ehrich v. A.G. Edwards & Sons, Inc.*, 675 F. Supp. 559 (D.S.D. 1987) (modifying evidently incorrect interest on award); *Oceania Shipping Corp. v. Thos. P. Gonzalez*, 442 F. Supp. 997, 1000 (S.D.N.Y. 1977) (refusing to modify interest calculation, as grounds were "not evident on the record"). Evidence presented to the court must conform to the Federal Rules. F.R.E. 1101. As argued below, both facsimiles were hearsay. F.R.E. 801.

[16] This Court has enunciated this principle with respect to sections 2, 3 and 4 of the Act: "Federal courts are bound to apply rules enacted by Congress with respect to matters . . . over which it has legislative power." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967).

[17] This Court has recently reiterated that if statutory language is clear, it is ordinarly conclusive. *Conroy v. Aniskoff*, 113 S.Ct. 1563, 1564 (1993); *Reves v. Ernst & Young*, 113 S.Ct. 1163, 1169 (1993); *Negonsott v. Samuels*, 113 S.Ct. 1119, 1123 (1993).

II. THE OPINION BELOW PROMOTES LITIGATION OF ARBITRATION AWARDS

The course of this case demonstrates the consequences of permitting lower courts to explore how and why an arbitration award was entered, in excess of their statutory authority. Three years have passed since the issuance of the Original Award, and this matter is not yet closed.

The appellate court instructed the district court to confirm an "award" that is a nullity. The direct consequence of this decision is to promote litigation.[18] First, it encourages parties to file post-award motions with arbitrators, asking them to reconsider the merits of their decisions. Unauthorized motions of this type violate the express intent of parties who agree to abide by a "final and binding" arbitration award. Second, it encourages parties to compel arbitrators and administrators (here the AAA) to divulge the factual and legal bases of a "final and binding" award. Discovery of this kind undermines the finality of arbitration awards and the effectiveness of arbitration as a dispute resolution mechanism.

In sum, this sort of judicial excess—which violates the intent of Congress to ensure the summary confirmation of awards[19]—hinders progress toward alternative dispute resolution.

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[18] Danella may argue that, because the Court of Appeals used an unpublished opinion to achieve the favored result, there will be no effect in later cases. This Court should disregard this argument, and review the unpublished opinion below. Otherwise, there will be one body of public law, and another body of private rulings entered in patient disregard of statutory commands. *See, e.g., United States v. Edge Broadcasting Co.*, 61 U.S.L.W. 4759 at n.3 (U.S. June 25, 1993) ("remarkable and unusual" that a court of appeals announce a judgment concerning the constitutionality of an Act of Congress by means of an unpublished opinion).

[19] *See, e.g., Taylor*, 788 F.2d at 225; *Florasynth*, 750 F.2d at 177.

III. SUMMATION

In recent years, this Court has granted certiorari petitions to reinforce the federal policy favoring arbitral resolution of disputes.[20] This case presents an opportunity to underline certain principles fundamental to federal arbitration law. First, the lower federal courts are confined to the statutory authority of the Federal Arbitration Act. When presented with an application for confirmation of an arbitration award, the lower courts may not disregard the rules prescribed by Congress for summary confirmation.

Second, the statutory language of the Act is clear and unambiguous. It reflects Congress's intention to place arbitration agreements on the same footing as other contracts and provide a means for their enforcement. The language of the Act means what it says, and nothing more.

Finally, contracts for "final and binding" arbitration are to be honored in the courts. Absent some indication of contrary intent, this language in an arbitration agreement precludes revision or modification by the arbitrators. Federal courts performing limited review of arbitration awards must adhere to the duty imposed by the Act to enforce arbitration agreements rigorously, in accordance with their terms.

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[20] *Perry v. Thomas*, 482 U.S. 483 (1987); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors*, 473 U.S. 614; *Dean Witter*, 470 U.S. 213; *Southland*, 465 U.S. 1; *Moses H. Cone*, 460 U.S. 1.

CONCLUSION

For the foregoing reasons, MCI respectfully submits that this petition for writ of certiorari should be granted.

Respectfully submitted,

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July 16, 1993

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1471

DANELLA CONSTRUCTION CORPORATION,
Appellant

v.

MCI TELECOMMUNICATIONS CORPORATION

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Civil No. 91-1053

Argued January 5, 1993

Before: MANSMANN, NYGAARD, *Circuit Judges*
and RODRIGUEZ, *District Judge**

(Opinion filed: Apr. 20, 1993)

OPINION OF THE COURT

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* Honorable Joseph H. Rodriguez, United States District Judge for the District of New Jersey, sitting by designation.

NYGAARD, Circuit Judge:

The issue on appeal is whether an arbitration panel has the authority to correct clerical errors in an award it issued. The district court concluded that the panel did not, refused to confirm a corrected award, and instead confirmed the panel's initial, erroneous award. Because we find that the arbitrators have authority to correct clerical errors and that the second award was entered to correct such a clerical mistake, we will reverse and remand.

I.

Appellant Danella Construction Company contracted to install fiber optic cable for MCI Telecommunications Company from Baton Rouge to DeQuincy, Louisiana. When Louisiana advised MCI that Danella was not licensed to do business in the state, MCI terminated its contract with Danella. Danella sued MCI in the Court of Common Pleas of Montgomery County, Pennsylvania. MCI removed the lawsuit to the United States District Court and counterclaimed against Danella for breach of contract.

After discovering that the contract contained a mandatory arbitration clause, the parties agreed to dismiss the federal action without prejudice. MCI filed a demand for arbitration with the American Arbitration Association (AAA). The parties selected arbitrators and following a hearing, Arbitrator Kenneth P. Gudgen telefaxed the following award to AAA offices:

> All briefs having been submitted and received, the arbitrators, having considered the evidence and the argument of counsel unanimously AWARD the sum of $141,160.19 to *Danella Construction Company*. The administrative fee paid to the American Arbitration Association by each party is assessed against such party (sic). All matters presented to the panel are disposed of by this award.

The next day, the AAA office sent the arbitrators a typed Award of Arbitrator in favor of *MCI* in the same amount. All three arbitrators signed the award which was then sent to the parties.

Danella filed a "Motion for Reconsideration" with the AAA, requesting that the award be corrected.[1] After reviewing Danella's motion and MCI's response, the same three arbitrators entered a corrected award in favor of Danella in the amount of $141,160.19.[2]

Danella filed a Petition to Confirm Arbitration and Enter Judgment in the Court of Common Pleas of Montgomery County, Pennsylvania, under 42 Pa.C.S.A. § 7342 (b) (Purdon 1990). MCI filed an Answer and Cross Petition and a Notice of Removal to the United States District Court. Danella then filed a Motion for Judgment on the Pleadings, and MCI filed a Motion for Summary Judgment. The district court initially denied both awards, but MCI later renewed its motion.

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[1] Instead of filing a "Motion for Reconsideration" with the AAA, Danella could have filed an action in the district court pursuant to 9 U.S.C. § 11 which provides: "in either of the following cases, the U.S. court in and for the district wherein the award was made may make an order modifying or correcting the award upon application of any party to the arbitration—

> (a) where there was an evident material miscalculation of figures or an evident material mistake in the description of any persons, thing, or property referred to in the award;
>
> (b) where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted;
>
> (c) where the award is imperfect in matter of form not affecting the merits of controversy.

[2] On August 14, 1990, Arbitrator Gudgen telefaxed to the Dallas AAA office a handwritten correction of the award, indicating: "the final award was typed backwards—see attached" and "URGENT!! Our award was in favor of Danella and against MCI. These were reversed when typed." See Appendix at 292A, 298A, 316A-317A.

The parties had specified by contract that the AAA rules would govern their dispute. The district court reviewed the AAA rules and found no procedure enabling arbitrators to reconsider their award. The district court concluded that the arbitrators did *not* have the power to vacate, modify, or correct an arbitration award. It granted MCI's renewed Motion for Summary Judgment and confirmed the initial award of arbitration in its favor.

II.

The district court had jurisdiction pursuant to 28 U.S.C. § 1332(a) after removal from the Court of Common Pleas of Montgomery County, Pennsylvania, pursuant to 28 U.S.C. § 1441(a). Our jurisdiction is based on 28 U.S.C. § 1291.

Because the issues presented in this appeal raise legal questions, our review is plenary. *Colonial Penn Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327, 331 (3d Cir. 1991).

III.

As a general principle of common law, arbitrators are the final judges of both the facts and the law, and their decision will not be disturbed for a mistake of either. *See P.G. Metals Co. v. Hofkin*, 420 Pa. 620, 218 A.2d 238 (1966). Moreover, once an award is made and published, the arbitrator generally can then do nothing more with respect to the subject matter of the arbitration. *LaVale Plaza Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569, 573 (3d Cir. 1967). In *LaVale Plaza*, however, we stated that it "has been recognized in common law arbitration that the arbitrator can correct a mistake which is apparent on the face of his award." *Id.* at 573 *citing Robinson-Rea Mfg. Co. v. Mellon*, 139 Pa. 257, 260 A. 91, 92 (1891). Our decision in *LaVale* recognized that

> the resolution of . . . an ambiguity is not within the policy which forbids an arbitrator to redetermine an

> issue which he has already decided, for there is no opportunity for redetermination on the merits of what has already been decided. Instead, the clarification of an ambiguity closely resembles the correction of a mistake apparent on the face of the award and the determination of an issue which the arbitrators had failed to decide.

Id.

The issue before us is not the arbitrators' power to reconsider the merits of their award. The issue is whether they have authority to correct a mistaken award. It is obvious that Arbitrator Gudgen recognized a mistake on the face of the award when Danella filed its Motion for Reconsideration. In his own handwriting, the arbitrator acknowledged "our award was in favor of Danella and against MCI. These were reversed when typed." After the arbitrators recognized the mistake on the face of the award, we conclude they acted within their powers to correct the mistake and reissue an award that reflected their original determination.

MCI argues that the common law doctrine of *functus officio* precludes the arbitrators from correcting their award once it is issued. We disagree. Black's Law Dictionary defines the doctrine as:

> A task performed. Having fulfilled the function, discharged the office or accomplished the purpose and therefore of no further force or authority. Applied to an officer whose term has expired and who has consequently no further official authority; and also to an instrument, power, agency, etc, which has fulfilled the purpose of its creation, and is therefore, of no further virtue or effect.

Black's Law Dictionary 606 (5th ed. 1979).

First, we could view this action by the arbitrators as simply outside the doctrine because the arbitrators' task

was not fully performed until their written award reflected their collective decision. In addition, there is a common law exception to the doctrine for correcting "a mistake which is apparent on the face of the award." See *LaVale Plaza,* 378 F.2d at 573. See also *Local P-9, United Food and Commercial Workers Union v. George A. Hormel & Co.,* 776 F.2d 1393, 1394 (8th Cir. 1985), *citing* Elkouri & Elkouri, *How Arbitration Works,* 239 (3d ed. 1973) (The authority and jurisdiction of the arbitrators are entirely terminated by the completion and delivery of an award. They have thereafter no power to recall or to "interpret" in such a manner as may be regarded as authoritative. *But they may correct clerical mistakes or obvious errors in arithmetical computation.*) (emphasis added).

The record is clear that when the first award was typed, someone inadvertently failed to follow the arbitrators' award and transposed the identification of the parties. This is a clerical error, and one which the arbitrators had authority to correct, whether under the doctrine of *functus officio* or its "clerical mistake" exception. We will reverse the order of the district court and remand for it to confirm the corrected award in favor of Danella.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 91-1053

DANELLA CONSTRUCTION CORP.

v.

MCI TELECOMMUNICATIONS CORP.

MEMORANDUM

BUCKWALTER, J. April, 14, 1992

Plaintiff Danella Construction Corporation ("Danella") instigated this action by filing a Petition to Confirm Arbitration Award and Enter Judgment in the Court of Common Pleas of Montgomery County, Pennsylvania on January 17, 1991. Defendant MCI Telecommunications Corporation ("MCI") subsequently sought removal to this court based on diversity jurisdiction. 28 U.S.C. § 1332 (a)(1) and § 1441. Having found jurisdiction, this court is presently being asked to decide which of two diametrically opposed arbitration awards it can enforce. Both Danella and MCI have entered motions for summary judgment. Fed. R. Civ. P. 56(c).

The court may grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party for summary judgment has the burden of showing that there is no genuine issue of material fact, and once the moving party has sustained this

burden, the opposing party must introduce specific evidence showing that there is a genuine issue for trial. *Williams v. West Chester,* 891 F.2d 458, 464 (3d Cir. 1989) *citing Celotex Corp. v. Catrett,* 477 U.S. 317, 322-24 (1986). In deciding a motion for summary judgment, the court must construe the facts in the light most favorable to the non-moving party. *Pollock v. American Tel. & Tel. Long Lines,* 794 F.2d 860, 864 (3d Cir. 1986). As explained below, the court grants summary judgment for MCI and denies summary judgment for Danella.

Factual Background

On January 30, 1986, MCI and Danella entered into a contract that called for Danella to install fiber optic cable from Baton Rouge to DeQuincy, Louisiana. In April of 1986, the state of Louisiana advised MCI that Danella was not licensed to work in Louisiana and subsequently on either April 24 or May 1, 1986, MCI terminated its contract with Danella and sought damages based on Danella's inability to obtain a Louisiana license. Danella denied that it breached the contract and countered that MCI owed Danella money for work completed under the contract.

On August 17, 1989, Danella brought suit against MCI in the Court of Common Pleas of Montgomery County, Pennsylvania asking for $268,523.19 in damages for money MCI allegedly owes Danella. On September 25, 1989, MCI removed the Montgomery County lawsuit to this federal district court and counterclaimed against Danella for breach of contract and damages totalling $250,554.00.

Upon discovery that the contract contained a mandatory arbitration clause,[1] the parties stipulated to a dis-

[1] The arbitration clause provides, in pertinent part:

Any dispute or disagreement arising between Contractor and MCI in connection with this Contract . . . shall be settled by ar-

missal of the federal action without prejudice. Subsequently, on November 1, 1989, MCI filed a demand for Arbitration with the American Arbitration Association ("AAA").

The parties subsequently selected and appointed three arbitrators pursuant to AAA procedures. On June 7, 1990, the arbitrators held a hearing in AAA offices in Dallas, Texas. Following the hearing, on June 27, 1990, Arbitrator Kenneth P. Gudgen telefaxed to the AAA offices in Dallas a form of Award that states:

> All briefs having been submitted and received, the Arbitrators, having considered the evidence and the argument of counsel unanimously AWARD the sum of $141,160.19 to Danella Construction Corporation. The administrative fee paid to the American Arbitration Association by each party is assessed against such part (sic). All matters presented to the Panel are disposed of by this Award.

The next day, June 28, 1990, the AAA office forwarded to the Arbitrators a typed Award of Arbitrators ("Original Award") which recited an award in favor of MCI in the amount of $141,160.19. Specifically, the award stated in part:

> Danella Construction Corporation ("Danella") shall pay to MCI Telecommunications Corporation ("MCI") the sum of One Hundred Forty One Thousand One Hundred Sixty Dollars and Nineteen Cents ($141,160.19).

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bitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association of the State of New York then in effect on the date that such notice is given. The decision of the arbitrator(s) shall be final and binding upon the Parties. Each Party shall bear the cost of preparing and presenting its case. The cost of the arbitration, including fees and expenses of the arbitrator(s), will be shared equally by the Parties unless the award otherwise provides.

The award also ordered Danella to pay miscellaneous expenses totalling $142.50. The three arbitrators, who included Kenneth P. Gudgen, Jeffrey A. Ford and Daniel J. Davis, signed the award on July 2, July 5 and July 11, 1990, respectively, and by letter of July 12, 1990, the AAA transmitted the award to the parties.

Sometime around August 1, 1990, Danella filed a Motion for Reconsideration with the AAA in Dallas requesting that judgment be entered in Danella's favor for $183,501.41. Danella never filed an application with this court under 9 U.S.C. § 11.[2] After reviewing Danella's motion and MCI's response, the same three arbitrators entered a new award in favor of Danella in the amount of $141,160.19 (the "Second Award") on August 20, 1991. The Second Award stated that the arbitrators had transposed the parties' names in the Original Award. The Second Award still required Danella to pay miscellaneous expenses totalling $146.50.

On January 17, 1991, Danella instigated the present action by filing a petition to Confirm Arbitration Award and Enter Judgment in the Court of Common Pleas of

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[2] In either of the following cases the United States Court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

Section 12 provides, in part, as follows:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.

Montgomery County, Pennsylvania seeking confirmation of the Second Award. MCI subsequently entered an Answer and Cross Petition and a Notice of Removal to this court. On August 5, 1991, Danella filed a Motion for Judgment on the Pleadings, and on September 4, 1991, MCI filed a Motion for Summary Judgment. This court denied both motions by order of September 18, 1991. The court now considers Danella's motion for summary judgment and MCI's cross motion for summary judgment.

Discussion

The basic question this court must answer is whether the arbitrators had the authority to reconsider the Original award and thus issue the Second arbitration award. If the arbitrators had the authority to reexamine the Original award and subsequently enter the Second award, as Danella argues, then this court should confirm the Second Award in favor of Danella. If, on the other hand, the arbitrators exceeded their authority by reconsidering the Original award and rendering a second award, as MCI argues, then the court should confirm the Original award in favor of MCI.

It is undisputed that the contract between MCI and Danella falls within the coverage of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, since their contract involved interstate commerce. Assuming the FAA exclusively applies, then this court should look to section 11 of the FAA for guidance in determining the arbitrator's authority. The contract's arbitration clause, which calls for arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Associaton, raises a question, however, as to the FAA's exclusive application to this dispute.

The court recognizes that a primary purpose behind the FAA was "to overrule the judiciary's long-standing refusal to enforce" arbitration agreements and to place

such agreements "upon the same footing as other contracts." *Volt Information Sciences v. Board of Trustees*, 109 S.Ct. 1249, 1255 (citations omitted). Thus, the FAA requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms. *Id.*

In keeping with that principle, the Supreme Court has observed that the FAA does not prevent enforcement of agreements to arbitrate under different rules than those set forth in the Act. *Id.* at 1255. The Court has further observed that:

> Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, [citation omitted], so too may they specify by contract the rules under which that arbitration will be conducted.

Id.

Subsequently, the Supreme Court held in *Volt* that where parties to a contract within the FAA's coverage agreed to abide by state rules of arbitration, a court should enforce those rules according to the terms of the agreement even if the result under the terms of the contract is contrary to what the FAA would permit. *Id.*

Like the parties in *Volt*, MCI and Danella specified by contract the rules under which their arbitration would be conducted. Here, the parties agreed to abide by the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA"). We turn then to the AAA rules to determine whether the arbitrators had the authority to reconsider their original award.

Turning to the AAA rules, the court finds that the rules provide no procedure whereby an arbitrator may reconsider an arbitration award. At most, section 1 of the

AAA rules provides that "[t]he parties, by written agreement, may vary the procedures set forth in these rules." As the parties have not provided in their contract a procedure whereby an arbitrator may reconsider an arbitration award and since this contract falls within the FAA's coverage, the court thus looks to the FAA for guidance. *Becker Audioradio v. Becker Audioradiowerk Gmbt,* 585 F.2d 39, 43 (3d Cir. 1978); *Coenen v. R.W. Pressprich & Co.,* 453 F.2d 1209, 1211 (2d Cir. 1972).

Under the FAA, the court and not the arbitrators have the power to vacate, modify, or correct an arbitration award. 9 U.S.C. § 10 and 11. The FAA does not authorize a procedure where arbitrators may recall and modify their final awards pursuant to the request of one of the parties as, for instance, New York's arbitration statute [3] allows. *American Centennial Insurance Company v. Arion Insurance Co., Ltd.,* 1990 WL 522295 *5 (S.D.N.Y. 1990).

Therefore, since the arbitrators lacked authority to reconsider or modify the original award in favor of MCI, the court finds the Second Award in favor of Daniella void and now vacates the Second Award. *See* 9 U.S.C. 10(d). The court thus also finds that the Original Award in favor of MCI should be confirmed pursuant to section 9 of the FAA.

An order follows.

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[3] N.Y. Civ. Prac. L & R. § 7509 and § 7511 (Consol. 1992).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 91-1053

DANELLA CONSTRUCTION CORP.

v.

MCI TELECOMMUNICATIONS CORP.

ORDER

AND NOW, this 14th day of April, 1992, upon consideration of Danella Construction Corporation's ("Danella") Motion for Summary Judgment, and MCI Telecommunication Corporation's ("MCI") response thereto, and MCI's Cross-Motion for Summary Judgment and Danella's response thereto, it is hereby ORDERED as follows:

1. Danella's Motion for Summary Judgment is DENIED.

2. MCI's Motion for Summary Judgment is GRANTED.

3. The Original Award in favor of MCI Telecommunications is hereby confirmed.

4. The Second Award in favor of Danella Construction Corporation is hereby VACATED and declared null and void.

5. Judgment is hereby entered in favor of MCI Telecommunications and against Danella Construction Cor-

poration in the amount of One Hundred Forty-One Thousand One Hundred Sixty Dollars and Nineteen Cents ($141,160.19) plus interest from July 11, 1990 and costs of suit.

BY THE COURT:

/s/ R.L.B.
RONALD L. BUCKWALTER, J.

[Dated Sep. 10, 1992]

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1471

DANELLA CONSTRUCTION CORPORATION,
Appellant
v.
MCI TELECOMMUNICATIONS CORPORATION

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and LEWIS, *Circuit Judges,* and RODRIGUEZ, *District Judge**

The petition for rehearing filed by appellee in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ [Illegible]
Circuit Judge

Dated: May 20, 1993.

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* Judge Rodriguez voted only on panel rehearing.

APPENDIX E

AMERICAN ARBITRATION ASSOCIATION

CONSTRUCTION INDUSTRY ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

MCI TELECOMMUNICATIONS CORPORATION

—and—

DANELLA CONSTRUCTION CORPORATION—DALLAS, TEXAS

Case Number 71 110 00552 89

Administrator: Debra J. Noack

AWARD OF ARBITRATOR(S)

WE, THE UNDERSIGNED ADMINISTRATOR(S), having been designated in accordance with the arbitration agreement entered into by the above-named parties, and dated January 30, 1986, and having been duly sworn and having duly heard the proofs and allegations of the parties, AWARD as follows:

Danella Construction Corporation ("Danella") shall pay to MCI Telecommunication Corporation ("MCI") the sum of One Hundred Forty One Thousand One Hundred Sixty Dollars and Ninteen Cents ($141,160.19).

The administrative fees and expenses of the American Arbitration Association totaling $2,535.56 shall be borne as incurred by the parties, and a miscellaneous expenses totaling $142.50 shall be borne by Danella and deducted from deposits previously advanced.

The expenses of the arbitrators totaling $72.30 shall be borne equally by the parties and deducted from deposits previously advanced.

The above listed sums are to be paid no later than 20 days from the date of this Award.

This Award is in full settlement of all claims submitted to this Arbitration.

Date: July 2, 1990 /s/ Kenneth P. Gudgen
KENNETH P. GUDGEN
Arbitrator

Date: July 5, 1990 /s/ Jeffrey A. Ford
JEFFREY A. FORD
Arbitrator

Date: July 11, 1990 /s/ Daniel J. Davis
DANIEL J. DAVIS
Arbitrator

[Notary Omitted in Printing]

APPENDIX F

AMERICAN ARBITRATION ASSOCIATION
CONSTRUCTION INDUSTRY ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

MCI TELECOMMUNICATIONS CORPORATION

—and—

DANELLA CONSTRUCTION CORPORATION—DALLAS, TEXAS

Case Number: 71 110 00552 89

Administrator: Debra J. Noack

MODIFICATION OF AWARD OF ARBITRATOR(S)

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the Arbitration Agreement entered into by the above-named parties, and dated January 30, 1986, and having been duly sworn and having duly heard the proofs and allegations of the parties, and have previously rendered an Award dated July 11, 1990, and Robert Kerns on behalf of Danella Construction Corporation having requested a modification by letter dated July 27, 1990 and Peter Brown on behalf of MCI Telecommunications Corporation having responded by letter dated August 8, 1990, do hereby, DECIDE, as follows:

In our original Award dated July 11, 1990, the parties were transposed in error in paragraph two (2). Therefore, our directive is as follows:

MCI Telecommunication Corporation ("MCI") shall pay to Danella Construction Corporation ("Danella") the sum of One Hundred Forty One Thousand One Hundred Sixty Dollars and Nineteen Cents ($141,160.19).

In all other respects our Award July 11, 1990 is reaffirmed and remains in full force and effect.

Date: 8/15/90

/s/ Kenneth P. Gudgen
KENNETH P. GUDGEN
Arbitrator

Date: 8/17/90

/s/ Jeffrey A. Ford
JEFFREY A. FORD
Arbitrator

Date: 8/20/90

/s/ Daniel J. Davis
DANIEL J. DAVIS
Arbitrator

APPENDIX G

AMERICAN ARBITRATION ASSOCIATION

CONSTRUCTION INDUSTRY ARBITRATION RULES

1. Agreement of Parties

The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) or under its Construction Industry Arbitration Rules. These rules and any amendment of them shall apply in the form obtaining at the time the demand for arbitration or submission agreement is received by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules.

2. Name of Tribunal

Any tribunal constituted by the parties for the settlement of their dispute under these rules shall be called the Construction Industry Arbitration Tribunal.

3. Administrator and Delegation of Duties

When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA's representatives as it may direct.

4. National Panel of Arbitrators

In cooperation with the National Construction Industry Arbitration Committee, the AAA shall establish and maintain a National Panel of Construction Industry Arbitrators and shall appoint arbitrators therefrom as hereinafter provided.

5. Regional Officers

The AAA may, in its discretion, assign the administration of an arbitration to any of its regional offices.

6. Initiation under an Arbitration Provision in a Contract

Arbitration under an arbitration provision in a contract shall be initiated in the following manner:

(a) The initiating party (hereinafter claimant) shall, within the time period, if any, specified in the contract(s), give written notice to the other party (hereinafter respondent) of its intention to arbitrate (Demand), which notice shall contain a statement setting forth the nature of the dispute, the amount involved, if any, the remedy sought, and the hearing locale requested, and

(b) Shall file at any regional office of the AAA three copies of the notice and three copies of the arbitration provisions of the contract, together with the appropriate administrative fee as provided in the Administrative Fee Schedule.

The AAA shall give notice of the filing to the respondent or respondents. A respondent may file an answering statement in duplicate with the AAA within ten days after notice from the AAA, in which event the respondent shall at the same time send a copy of the answering statement to the claimant. If a counterclaim is asserted, it shall contain a statement setting forth the nature of the counterclaim, the amount involved, if any, and the remedy sought. If a counterclaim is made in the answering statement, the appropriate fee provided in the Administrative Fee Schedule shall be forwarded to the AAA with the answering statement. If no answering statement is filed within the stated time, it will be treated as a denial of the claim. Failure to file an answering statement shall not operate to delay the arbitration.

7. Initiation under a Submission

Parties to any existing dispute may commence an arbitration under these rules by filing at any regional office of the AAA three copies of a written submission to arbitrate under these rules, signed by the parties. It shall contain a statement of the matter in dispute, the amount of money involved, if any, the remedy sought, and the hearing locale requested, together with the appropriate administrative fee as provided in the Administrative Fee Schedule.

8. Changes of Claim

After filing of a claim, if either party desires to make any new or different claim or counterclaim, same shall be made in writing and filed with the AAA, and a copy shall be mailed to the other party, who shall have a period of ten days from the date of such mailing within which to file an answer with the AAA. After the arbitrator is appointed, however, no new or different claim may be submitted with the arbitrator's consent.

9. Applicable Procedures

Unless the AAA in its discretion determines otherwise, the Expedited Procedures shall be applied in any case where no disclosed claim or counterclaim exceed $25,000, exclusive of interest and arbitration costs. Parties may also agree to the Expedited Procedures in cases involving claims in excess of $25,000. The Expedited Procedures shall be applied as described in Sections 53 through 57 of these rules.

All other cases shall be administered in accordance with Sections 1 through 52 of these rules.

10. Administrative Conference, Preliminary Hearing, and Mediation Conference

At the request of any party or at the discretion of the AAA, an administrative conference with the AAA and the

parties and/or their representatives will be scheduled in appropriate cases to expedite the arbitration proceedings.

In large or complex cases, at the request of any party or at the discretion of the arbitrator or the AAA, a preliminary hearing with the parties and/or their representatives and the arbitrator may be scheduled by the arbitrator to specify the issues to be resolved, stipulate to uncontested facts, and to consider any other matters that will expedite the arbitration proceedings. Consistent with the expedited nature of arbitration, the arbitrator may, at the preliminary hearing, establish (i) the extent of and schedule for the production of relevant documents and other information, (ii) the identification of any witnesses to be called, and (iii) a schedule for further hearings to resolve the dispute.

With the consent of the parties, the AAA at any stage of the proceeding may arrange a mediation conference under the Construction Industry Mediation Rules, in order to facilitate settlement. The mediator shall not be an arbitrator appointed to the case. Where the parties to a pending arbitration agree to mediate under the AAA's rules, no additional administrative fee is required to initiate the mediation.

11. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. If any party requests that the hearing be held in a specific locale and the other party files no objection thereto within ten days after notice of the request has been mailed to it by the AAA, the locale shall be the one requested. If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale and its decision shall be final and binding.

12. Qualifications of an Arbitrator

Any neutral arbitrator appointed pursuant to Section 13, 14, 15, or 54, or selected by mutual choice of the parties

or their appointees, shall be subject to disqualification for the reasons specified in section 19. If the parties specifically so agree in writing, the arbitrator shall not be subject to disqualification for said reasons.

Unless the parties agree otherwise, an arbitrator selected unilaterally by one party is a party-appointed arbitrator and is not subject to disqualification pursuant to Section 19.

The term "arbitrator" in these rules refers to the arbitration panel, whether composed of one or more arbitrators and whether the arbitrators are neutral or party-appointed.

13. Appointment from Panel

If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner: Immediately after the filing of the Demand or Submission, the AAA shall submit simultaneously to each party to the dispute an identical list of names of persons chosen from the panel.

Each party to the dispute shall have ten days from the mailing date in which to cross off any names objected to, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the panel without the submission of additional lists.

14. Direct Appointment by a Party

If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with the name and address of the arbitrator, shall be filed with the AAA by that party. Upon the request of any appointing party, the AAA shall submit a list of members of the panel from which the party may, if it so desires, make the appointment.

If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make the appointment within that period, the AAA shall make the appointment.

If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If within ten days thereafter an arbitrator has not been appointed by a party, the AAA shall make the appointment.

15. Appointment of Neutral Arbitrator by Party-Appointed Arbitrators

If the parties have selected party-appointed arbitrators, or if such arbitrators have been appointed as provided in Section 14, and the parties have authorized them to appoint a neutral arbitrator within a specified time and no appointment is made within that time or any agreed extension thereof, the AAA may appoint the neutral arbitrator, who shall act as chairperson.

If no period of time is specified for appointment of the neutral arbitrator and the party-appointed arbitrators do not make the appointment within ten days from the date of the appointment of the last party-appointed arbitrator, the AAA may appoint the neutral arbitrator, who shall act as chairperson.

If the parties have agreed that their party-appointed arbitrators shall appoint the neutral arbitrator from the panel, the AAA shall furnish to the party-appointed arbitrators,

in the manner prescribed in Section 13, a list selected from the panel, and the appointment of the neutral arbitrator shall be made as prescribed in that section.

16. Nationality of Aribtrator in International Arbitration

Where the parties are nationals or residents of different countries, any neutral arbitrator shall, upon the request of either party, be appointed from among the nationals of a country other than that of any of the parties. The request must be made prior to the time set for the appointment of the arbitrator as agreed by the parties or set by these rules.

17. Number of Arbitrators

If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA in its discretion, directs that a greater number of arbitrators be appointed.

18. Notice to Arbitrator of Appointment

Notice of the appointment of the neutral arbitrator, whether mutually appointed by the parties or by the AAA, shall be mailed to the arbitrator by the AAA, together with a copy of these rules, and the signed acceptance of the arbitrator shall be filed with the AAA prior to the opening of the first hearing.

19. Disclosure and Challenge Procedure

Any person appointed as neutral arbitrator shall disclose to the AAA any circumstance likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others. Upon objection of a party to the

continued service of a neutral arbitrator, the AAA shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive.

20. Vacancies

If for any reason an arbitrator should be unable to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these rules.

In the event of a vacancy in a panel of neutral arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.

21. Date, Time, and Place of Hearing

The arbitrator shall set the date, time, and place for each hearing. The AAA shall mail to each party notice thereof at least ten days in advance, unless the parties by mutual agreement waive such notice or modify the terms thereof.

22. Representation

Any party may be represented by counsel or other authorized representative. A party intending to be so represented shall notify the other party and the AAA of the name and address of the representative at least three days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, such notice is deemed to have been given.

23. Stenographic Record

Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify

the other party of these arrangements in advance of the hearing. The requesting party or parties shall pay the cost of the record. If the transcript is agreed by the parties to be, or determined by the arbitrator to be, the official record of the proceeding, it must be made available to the arbitrator and to the other parties for inspection, at a date, time, and place determined by the arbitrator.

24. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

25. Attendance at Hearings

The arbitrator shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any person.

26. Postponements

The arbitrator for good cause shown may postpone any hearing upon the request of a party or upon the arbitrator's own initiative, and shall also grant such postponement when all of the parties agree thereto.

27. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify

under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

28. Majority Decision

All decisions of the arbitrators must be by a majority. The award must also be made by a majority unless the concurrence of all is expressly required by the arbitration agreement or by law.

29. Order of Proceedings and Communication with Arbitrator

A hearing shall be opened by the filing of the oath of the arbitrator, where required; by the recording of the date, time, and place of the hearing, and the presence of the arbitrator, the parties, and their representatives, if any; and by the receipt by the arbitrator of the statement of the claim and the answering statement, if any.

The arbitrator may, at the beginning of the hearing, ask for statements clarifying the issues involved. In some cases, part or all of the above will have been accomplished at the preliminary hearing conducted by the arbitrator pursuant to Section 10.

The complaining party shall then present evidence to support its claim. The defending party shall then present evidence supporting its defense. Witnesses for each party shall submit to questions or other examination. The arbitrator has the discretion to vary this procedure but shall afford a full and equal opportunity to all parties for the presentation of any material and relevant evidence.

Exhibits, when offered by either party, may be received in evidence by the arbitrator.

The names and addresses of all witnesses and a description of the exhibits in the order received shall be made a part of the record.

There shall be no direct communication between the parties and a neutral arbitrator other than at oral hearings, unless the parties and the arbitrator agree otherwise. Any other oral or written communication from the parties to a neutral arbitrator shall be directed to the AAA for transmittal to the arbitrator.

30. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

31. Evidence

The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent in default or has waived the right to be present.

32. Evidence by Affidavit and Post-hearing Filing of Documents or Other Evidence

The arbitrator may receive and consider the evidence of witnesses by affidavit, but shall give it only such weight

as the arbitrator deems it entitled to after consideration of any objection made to its admission.

If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine such documents or other evidence.

33. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the date and time and the AAA shall notify the parties. Any party who so desires may be present at such an inspection or investigation. In the event that one or all parties are not present at the inspection or investigation, the arbitrator shall make a verbal or written report to the parties and afford them an opportunity to comment.

34. Interim Measures

The arbitrator may issue such orders for interim relief as may be deemed necessary to safeguard the property that is the subject matter of the arbitration without prejudice to the rights of the parties or to the final determination of the dispute.

35. Closing of Hearing

The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed and a minute thereof shall be recorded. If briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If documents are to be filed as provided

for in Section 32 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the date of closing the hearing. The time limit within which the arbitrator is required to make the award shall commence to run, in the absence of other agreements by the parties, upon the closing of the hearing.

36. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed on by the parties in the contract(s) out of which the controversy has arisen, the matter may not be reopened unless the parties agree on an extension of time. When no specific date is fixed in the contract, the arbitrator may reopen the hearing and shall have thirty days from the closing of the reopened hearing within which to make an award.

37. Waiver of Oral Hearing

The parties may provide, by written agreement, for the waiver of oral hearings in any case. If the parties are unable to agree as to the procedure, the AAA shall specify a fair and equitable procedure.

38. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection thereto in writing, shall be deemed to have waived the right to object.

39. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good

cause extend any period of time established by these rules, except the time for making the award. The AAA shall notify the parties of any extension.

40. Serving of Notice

Each party shall be deemed to have consented that any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules; for any court action in connection therewith; or for the entry of judgment on any award made under these rules may be served on a party by mail addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard thereto has been granted to the party.

The AAA and the parties may also use facsimile transmission, telex, telegram, or other written forms of electronic communication to give the notices required by these rules.

41. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than thirty days from the date of closing the hearing, or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statement and proofs to the arbitrator.

42. Form of Award

The award shall be in writing and shall be signed by a majority of the arbitrators. It shall be executed in the manner required by law.

43. Scope of Award

The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope

of the agreement of the parties, including, but not limited to, specific performance of a contract. The arbitrator shall, in the award, assess arbitration fees, expenses, and compensation as provided in Sections 48, 49, and 50 in favor of any party and, in the event that any administrative fees or expenses are due the AAA, in favor of the AAA.

44. Award upon Settlement

If the parties settle their dispute during the course of the arbitration, the arbitrator may set forth the terms of the agreed settlement in an award. Such an award is referred to as a consent award.

45. Delivery of Award to Parties

Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail addressed to a party or its representative at the last known address, personal service of the award, or the filing of the award in any other manner that is permitted by law.

46. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party, furnish to the party, at its expense, certified copies of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

47. Applications to Court and Exclusion of Liability

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary party in judicial proceedings relating to the arbitration.

(c) Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

(d) Neither the AAA nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these rules.

48. Administrative Fee

As a not-for-profit organization, the AAA shall prescribe an Administrative Fee Schedule and a Refund Schedule to compensate it for the cost of providing administrative services. The schedule in effect at the time the demand for arbitration or submission agreement is received shall be applicable.

The administrative fee shall be advanced by the initiating party or parties, subject to final apportionment by the arbitrator in the award.

When a claim or counterclaim is withdrawn or settled, the refund shall be made in accordance with the Refund Schedule.

The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fee.

49. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

50. Neutral Arbitrator's Fee

Unless the parties agree otherwise, members of the National Panel of Construction Industry Arbitrators appointed as neutrals will serve without compensation for the first day of service.

Thereafter, compensation shall be based on the amount of service involved and the number of hearings. An appropriate daily rate and other arrangements will be discussed by the administrator with the parties and the arbitrator. If the parties fail to agree to the terms of compensation, an appropriate rate shall be established by the AAA and communicated in writing to the parties.

Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator. The terms of compensation of neutral arbitrators on a panel shall be identical.

51. Deposits

The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to defray the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.

52. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is unobtainable, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

Expedited Procedures

53. Notice by Telephone

The parties shall accept all notices from the AAA by telephone. Such notices by the AAA shall subsequently be confirmed in writing to the parties. Should there be a failure to confirm in writing any notice hereunder, the proceeding shall nonetheless be valid if notice has, in fact, been given by telephone.

54. Appointment and Qualifications of Arbitrator

Where no disclosed claim or counterclaim exceeds $25,000 exclusive of interest and arbitration costs, the AAA shall submit simultaneously to each party an identical list of five proposed arbitrators drawn from the National Panel of Construction Industry Arbitrators, from which one arbitrator shall be appointed.

Each party may strike two names from the list on a peremptory basis. The list is returnable to the AAA within seven days from the date of the AAA's mailing to the parties.

If for any reason the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment from among other members of the panel without the submission of additional lists.

The parties will be given notice by telephone by the AAA of the appointment of the arbitrator, who shall be subject to disqualification for the reasons specified in Section 19. The parties shall notify the AAA, by telephone, within seven days of any objections to the arbitrator appointed. Any objection by a party to the arbitrator shall be confirmed in writing to the AAA with a copy to the other party or parties.

55. Date, Time, and Place of Hearing

The arbitrator shall set the date, time, and place of the hearing. The AAA will notify the parties by telephone, at

least seven days in advance of the hearing date. Formal Notice of Hearing will be sent by the AAA to the parties.

56. The Hearing

Generally, the hearing shall be completed within one day, unless the dispute is resolved by submission of documents under Section 37. The arbitrator, for good cause shown, may schedule an additional hearing to be held within seven days.

57. Time of Award

Unless otherwise agreed by the parties, the award shall be rendered not later than fourteen days from the date of the closing of the hearing.

Administrative Fee Schedule

A filing fee of $300 will be paid at the time a case is filed. The balance of the administrative fee is based on the amount of each claim or counterclaim as disclosed when the claim or counterclaim is filed. This balance is due and payable ninety days after AAA's commencement of administration, or prior to the date of the first hearing, whichever occurs first. If a claim or counterclaim is settled or withdrawn, the Refund Schedule shall apply. When oral hearings are waived under Section 37, the Administrative Fee Schedule shall still apply.

Amount of Claim or Counterclaim	Fee
$1 to $25,000	3% ($300 minimum)
$25,000 to $50,000	$750, plus 2% of excess over $25,000
$50,000 to $100,000	$1,250, plus 1% of excess over $50,000
$100,000 to $200,000	$1,750, plus ½% of excess over $100,000
$200,000 to $5,000,000	$2,250, plus ¼% of excess over $200,000
$5,000,000 to $50,000,000	$14,250, plus 1/10% of excess over $5,000,000

Where the claim or counterclaim exceeds $50 million, there is no additional administrative fee.

When no amount can be stated at the time of filing, the administrative fee is $750, subject to adjustment in accordance with the above schedule as soon as an amount can be disclosed.

An appropriate administrative fee will be determined by the AAA for claims and counterclaims that are not for a monetary amount.

If there are more than two parties represented in the arbitration, an additional 10% of the administrative fee will be due for each additional represented party.

Postponement Fees

Sole-Arbitrator Cases

$50 is payable by a party causing its first postponement of any scheduled hearing.

$100 is payable by a party causing its second or subsequent postponement of any scheduled hearin.

Three-Arbitrator Cases

$75 is payable by a party causing its first postponement of any scheduled hearing.

$150 is payable by a party causing its second or subsequent postponement of any scheduled hearing.

Additional Hearing Fee

$75 is payable by each party for each hearing after the first hearing that is either clerked by the AAA or held in a hearing room provided by the AAA.

Refund Schedule

The refund schedule is based on the administrative fee due on a claim or counterclaim asserted by a party.

If the AAA is notified that a claim or counterclaim has been settled or withdrawn before a list of arbitrators has been sent out, all of the fee in excess of $300 will be refunded.

If the AAA is notified that a claim or counterclaim has been settled or withdrawn after a list of arbitrators has been sent out but before the original due date for the return of the first list, two thirds of the fee in excess of $300 will be refunded.

If the AAA is notified that a claim or counterclaim has been settled or withdrawn after the original due date for the return of the first list but at least two business days before the initial date and time set for the first scheduled hearing, one third of the fee in excess of $300 will be refunded.

There will be no refund after a preliminary hearing or mediation conference has been held; where a claim or counterclaim was filed as an undetermined claim and remained so at the time of settlement or withdrawal; or where a consent award was issued by the arbitrator.

APPENDIX H

The United States (Federal) Arbitration Act (FAA) Title 9 U.S.C.

* * * *

§ 1. "Maritime Transactions" and "Commerce" Defined; Exceptions to Operation of Title

"Maritime transaction", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repair to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, Irrevocability, and Enforcement of Agreements to Arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of Proceedings Where Issue Therein Referable to Arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to Arbitrate Under Agreement; Petition to United States Court Having Jurisdiction for Order to Compel Arbitration; Notice and Service Thereof; Hearing and Determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.

If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order sumarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

* * * *

§ 9. Award of Arbitrators; Confirmation; Jurisdiction; Procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, than at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and there-

upon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to

section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

§ 11. Same; Modification or Correction; Grounds; Order

In either of the following cases the United States court in and for the distirct wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§ 12. Notice of Motions to Vacate or Modify; Service; Stay of Proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the

marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

§ 13. Papers Filed with Order on Motions; Judgment; Docketing; Force and Effect; Enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

FILED
AUG 12 1993
OFFICE OF THE CLERK

No. 93-087

In The

Supreme Court of the United States

October Term, 1993

MCI TELECOMMUNICATIONS CORPORATION,

Petitioner,

vs.

DANELLA CONSTRUCTION CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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APPENDIX

Appendix A — Telefax Communications Re: Award of Arbitrator 1a

Appendix B — Telefax Communcations Re: Award 5a

No. 93-087

In The

Supreme Court of the United States

October Term, 1993

MCI TELECOMMUNICATIONS CORPORATION,

Petitioner,

vs.

DANELLA CONSTRUCTION CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Danella Construction Corporation, respectfully prays that the Petition for a Writ of Certiorari filed by MCI Telecommunications Corporation be denied.

COUNTER STATEMENT OF THE CASE

As set forth in the Statement of the Case of MCI Telecommunications Corporation ("MCI"), this matter concerned mutual claims for damages pursuant to a construction contract entered into by the parties for installation by Danella Construction

Corporation ("Danella") of fiber optic cable in Louisiana. After a hearing before a panel of three arbitrators pursuant to the provisions of the contract between the parties and issuance by them of an Award of Arbitrators on July 11, 1990, Danella filed a Motion for Reconsideration which raised procedural as well as substantive reasons for reconsideration of the Award. When this Motion was forwarded to the arbitrators, the chief arbitrator sent an urgent telefax communication to the offices of the American Arbitration Association ("AAA") under whose auspices the arbitration had been conducted stating that the Award was meant to be in favor of Danella and against MCI and that the parties were inadvertently reversed when the Award was typed by AAA personnel. Appendix A at 1a. Following the arbitration hearing, the chief arbitrator had telefaxed a form of Award to the AAA offices for typing wherein Danella was recited as the prevailing party. Appendix B at 5a. The AAA staff thereupon prepared a Modification of Award of Arbitrators correctly reciting Danella as the prevailing party, and this corrected Award was executed by the arbitrators on August 20, 1990.

Following the filing of Cross-Motions for Summary Judgment, the United States District Court for the Eastern District of Pennsylvania entered an Order vacating the Modification of Award of Arbitrators and reinstating the first Award. In its opinion, the District Court decided that the arbitrators were without power to correct the clerical error set forth in the first Award, and in doing so looked to the provisions of Sections 10 and 11 of the Federal Arbitration Act, 9 U.S.C. §§ 10 and 11, for "guidance". On appeal, the United States Court of Appeals for the Third Circuit reversed this Order and directed the lower court to reinstate the Modification of Award of Arbitrators wherein Danella was correctly recited as the prevailing party. In so ruling, the Third Circuit held that the arbitrators possessed residual authority to correct the clerical mistake set forth in the original Award.

REASON FOR DENYING THE WRIT

In its Petition, MCI has failed to satisfy any of the standards set forth in Supreme Court Rule 17.1 (a) or (c). MCI has pointed to no conflict in the Circuits which requires resolution by this Court, nor has it raised an important question of federal law which has not been but should be settled by this Court.

MCI's basic contention is that the procedural provisions of the Federal Arbitration Act ("FAA") provide the exclusive method whereby an arbitration award may be corrected. MCI then asserts that Danella was required to seek correction of the erroneous original Award by application to the appropriate District Court pursuant to Section 11 (a) of the FAA, 9 U.S.C. § 11 (a). MCI then further asserts that *any* modification of the original Award is barred by virtue of the expiration of the three month notice period set forth in Section 12 of the FAA, 9 U.S.C. § 12.

Such a position constitutes a misconstruction of the basic purpose and intent of the FAA as clearly enunciated by this Court. The Act was meant to create a body of federal substantive law of arbitrability applicable to any arbitration agreement involving interstate commerce and was not, as MCI suggests, meant to create a specific prescriptive procedure. *Volt Information Sciences v. Board of Trustees,* 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989); *Moses H. Cone Memorial Hospital v. Mercury Construction,* 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). The substantive law created by Congress in enacting this statute was in response to a then widespread judicial refusal to enforce arbitration agreements. *Volt, supra; Southland Corp. v. Keating,* 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984). The substantive law of the statute was meant to reverse this circumstance and to implement a liberal federal policy favoring arbitration agreement notwithstanding any state substantive or procedural policies to the contrary. *Mercury Construction, supra.* This substantive law

favoring arbitration agreements and requiring their rigorous enforcement is embodied in Sections 1 and 2 of the FAA. *Volt, supra; Perry v. Thomas,* 482 U.S. 483, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987).

It is clear that the substantive law embodied in Sections 1 and 2 of the FAA is applicable to a dispute relating to interstate commerce[1] regardless of whether litigation surrounding the dispute is initiated in state or federal court. *Perry, supra; Mercury Construction, supra.* This substantive federal law and policy was fully implemented in the instant case by virtue of the parties having jointly referred their entire controversy to arbitration pursuant to the express terms of their contract. The federal policy against frustration of arbitration agreements having been satisfied, Danella was thereupon free to employ procedures available either under federal law by way of the FAA or appropriate state and common law relative to correction and implementation of the Award of Arbitrators. Your Honorable Court has recognized the appropriateness of choosing a state forum for this purpose. *Perry, supra; Mercury Construction, supra; Keating, supra.*

In the instant case, Danella chose to enforce the Award of Arbitrators as corrected by them in state court as opposed to employing the specific procedures set forth in Sections 11 and 12 of the FAA. Under circumstances such as this, Your Honorable Court has specifically held that only Sections 1 and 2 of the FAA are applicable. *Volt, supra.*[2] As Your Honorable Court stated in *Volt, supra:*

---

1. Danella has agreed that the contract at issue relates to interstate commerce.

2. The Court in that case withheld a decision as to the applicability of Sections 3 and 4 to state court proceedings. *Compare Mercury Construction, supra,* Notes 32-35, wherein it is suggested that Section 3 may also be applicable to state court proceedings.

> There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to insure the enforceability, according to their terms, of private agreements to arbitrate.

Had Danella chosen to seek modification or correction of the Award in federal courts, then the procedural aspects of the FAA would have been applicable in their entirety. *See Mutual Fire Marine and Inland Insurance Company v. Norad Reinsurance Company, Ltd.*, 868 F. 2d 52 (3rd Cir. 1989). However, if a party such as Danella does not elect to so proceed under the procedural aspects of the FAA, it is not bound by these procedural provisions. On the contrary, it is free to seek modification of the Award from the arbitrators and enforcement of it in state courts pursuant to any procedures there applicable under state law. As the court stated in *Martin v. Youngstown Sheet and Tube Company,* 911 F. 2d 1239 (7th Cir. 1990):

> The FAA allows certain persons — parties to the arbitration — under certain conditions to apply to a district court for a confirmation, vacation, or modification of the award . . . but it does not limit the means by which these persons can confirm, vacate or modify the award to the court alone. The FAA is an enabling statute not a proscribing one. In general, it does not restrict the parties from seeking additional guidance from the arbitrator; in fact it encourages it.

There is no dispute among any of the Circuits concerning these legal principals. In arguing that the procedural sections of the FAA have preempted any state law procedures and therefore must apply to this proceeding, MCI has relied upon a slip opinion from

the United States District Court for the Southern District of New York. *American Centennial Insurance Co. v. Arion Insurance Co. Ltd.*, No. 88-1665, Slip Op. (S.D.N.Y. April 18, 1990). In that case, the court improperly relied upon *Coenen v. RW Pressprich and Company*, 453 F. 2d 1209 (2nd Cir. 1972), *cert. denied*, 406 U.S. 949 (1972) in concluding that the procedural sections of the FAA precluded modification by arbitrators of their Award. In *Coenen, supra*, the Court did not hold that Sections 9 through 12 of the FAA must apply to any instance involving modification of an arbitrator's award. Rather, that case dealt with the substantive issue of arbitrability to which Sections 1 and 2 of the FAA apply. The Court there properly held that this issue of arbitrability was properly governed by the federal law and policy of liberal construction of arbitration clauses. The Court did not have before it, nor did it decide, any issue as to the exclusive applicability of the procedural sections of the FAA to modification and enforcement of arbitration awards.

This case involves no conflict among the Circuits concerning the applicability of the substantive or procedural aspects of the FAA to this proceeding. This case also represents a clear application by the Third Circuit of its previous decisions with respect to modification of an arbitration award to correct a clerical mistake therein as embodied in *LaValle Plaza, Inc. v. RS Noonan, Inc.*, 378 F. 2d 569, 37 A.L.R. 3rd 189 (3rd Cir. 1967). It therefore does not present an important question which needs to be settled by Your Honorable Court.

CONCLUSION

For the foregoing reasons, Danella respectfully requests that MCI's Petition for Writ of Certiorari be denied.

Respectfully submitted,

ROBERT J. KERNS
Counsel of Record
LANDIS, KERNS P.C. AND ASSOCIATES
Attorneys for Respondent
425 West Main Street
Lansdale, PA 19446
(215) 855-9521

APPENDIX A — TELEFAX COMMUNICATIONS RE: AWARD OF ARBITRATOR

TELECOPY COVER SHEET

GANDY MICHENER SHINDLE WHITAKER & PRATT

3500 City Center Tower II	Telephone	817/335-4417
301 Commerce Street	Metro	817/429-6268
Fort Worth, Texas 76102	Senders DID	817/878-

TELECOPY: (817) 335-6935 (PANAFAX MV-3000 AUTOMATIC)

PLEASE DELIVER TO: *Debra J. Noack*

DESTINATION NUMBER: *(214) 490-9008*

REGARDING: *DANELLA/MCI 71 110 00552 89*

OUR FILE NUMBER: *10449.010*

MESSAGE: *The final award as typed was backwards — see attached*

FROM: *Ken Gudgen*

DATE: *8/14/90*

IN CASE OF PROBLEMS, PLEASE CALL *Lori* AT 817/878-

THIS IS PAGE *1* of 2 PAGES

Appendix A

URGENT!!

Our award was in favor of Danella and against MCI. These were reversed when typed.

Appendix A

AMERICAN ARBITRATION ASSOCIATION

CONSTRUCTION INDUSTRY ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

MCI Telecommunications Corporation

-AND-

Danella Construction Corporation — Dallas, Texas

CASE NUMBER: 71 110 00552 89

ADMINISTRATOR: Debra J. Noack

AWARD OF ARBITRATOR(S)

WE, THE UNDERSIGNED ARBITRATOR(S), having been designated in accordance with the arbitration agreement entered into by the above-named parties, and dated January 30, 1986, and having been duly sworn and having duly heard the proofs and allegations of the parties. AWARD as follows:

MCI Corporation ("Danella") shall pay to Danella Construction Corporation ("MCI") the sum of One Hundred Forty One Thousand One Hundred Sixty Dollars and Nineteen Cents ($141,160.19).

The administrative fees and expenses of the American Arbitration Association totaling $2,535.56 shall be borne as incurred by the parties, and a miscellaneous expenses totaling $142.50 shall be borne by Danella and deducted from deposits previously advanced.

Appendix A

The expenses of the arbitrators totaling $72.30 shall be borne equally by the parties and deducted from deposits previously advanced.

The above listed sums are to be paid no later than 20 days from the date of this Award.

This Award is in full settlement of all claims submitted to this Arbitration.

DATE: *July 2, 1990*

SIGNED:
Kenneth P. Gudgen
Kenneth P. Gudgen, Arbitrator

DATE: *July 5, 1990*

SIGNED:
Jeffrey A. Ford
Jeffrey A. Ford, Arbitrator

DATE: *July 11, 1990*

SIGNED:
Daniel J. Davis
Daniel J. Davis, Arbitrator

* * *

APPENDIX B — TELEFAX COMMUNICATIONS RE: AWARD

TELECOPY COVER SHEET

GANDY MICHENER SWINDLE WHITAKER & PRATT

[stamped]
AMERICAN ARBITRATION
ASSOCIATION
FILED
JUN 27 1990
DALLAS REGIONAL

3500 City Center Tower II	Telephone	817/335-4417
301 Commerce Street	Metro	817/429-6268
Fort Worth, Texas 76102	Senders DID	817/878-0576

TELECOPY: (817) 335-6935 (PANAFAX MV-3000 AUTOMATIC)

PLEASE DELIVER TO: *DEBBIE NOACK*

DESTINATION NUMBER: *(214) 490-9008*

REGARDING: *DANELLA*

OUR FILE NUMBER: *10449.010*

MESSAGE: *ATTACHED IS THE AWARD.*

FROM: *KEN GUDGEN*

DATE: *June 27, 1990*

Appendix B

IN CASE OF PROBLEMS, PLEASE CALL *KRISTIN* AT 817/878-0548

THIS IS PAGE *1* OF *2* PAGES

Appendix B

CASE NO. 71 110 00552 89

MCI Telecommunications

-and-

Danella Construction Corporation

AWARD

All briefs having been submitted and received, the Arbitrators, having considered the evidence and the argument of counsel unanimously AWARD the sum of $141,160.19 to Danella Construction Corporation. The administrative fee paid to the American Arbitration Association by each party is assessed against such part. All matters presented to the Panel are disposed of by this Award.

Supreme Court, U.S.
FILED
AUG 27 1993
OFFICE OF THE CLERK

No. 93-87

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

DANELLA CONSTRUCTION CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY BRIEF

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August 27, 1993

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-87

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

DANELLA CONSTRUCTION CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITIONER'S REPLY BRIEF

In its Brief in Opposition, Respondent Danella Construction Corporation ("Respondent") simply confirms that the Third Circuit Court of Appeals substituted state for federal law:

> ". . . [The] federal law and policy was fully implemented in the instant case by virtue of the parties having jointly referred their entire controversy to arbitration pursuant to the express terms of their contract. The federal policy against frustration of arbitration agreements having been satisfied, Danella was thereupon free to employ procedures available

> either under federal law by way of the FAA or appropriate state and common law . . ."

Opposition at p. 4.

Respondent is forced to adopt this awkward position because the Court of Appeals itself adopted state law to vacate the original arbitration Award. In defending the opinion below, Respondent relies on two cases, neither of which supports its novel argument. Respondent first cites *Volt Information Sciences v. Board of Trustees,* 489 U.S. 468 (1989). That case holds that where the parties have agreed that a state's laws will govern their contract, the Federal Arbitration Act does not preempt that choice in favor of federal law. *Id.* at 479. *Volt* does not permit a federal court to choose state or federal law in a case decided under the federal act.

Respondent also relies on *Martin v. Youngstown Sheet & Tube Co.,* 911 F.2d 1239 (7th Cir. 1990), a case arising under Section 301 of the Labor Management Relations Act. The *Martin* case is correctly cited for the proposition that contracting parties are "free to structure their arbitration agreements as they see fit." 911 F.2d at 1243 n.8, *quoting Volt, supra.* Reliance on *Martin* is completely misplaced in this case because the issue is not whether to honor a choice of law clause, but whether to honor the Federal Arbitration Act.

Both parties, the district court, and the Court of Appeals recognized the applicability of the Federal Arbitration Act. Only the Court of Appeals failed to follow the commands of the Act. It is telling that Respondent cites no case that would permit any federal court to choose which portions of the Act it will follow.

The reason that Respondent cites no authority in support of the Court of Appeals' analysis is that the analysis turns the Supremacy Clause of the United States Constitution on its head. In the Act, Congress provided a

rule of decision for state and federal courts.[1] The plain provisions of the statute have been upheld by this Court on numerous occasions. *Perry v. Thomas,* 482 U.S. 483 (1987); *Southland Corp. v. Keating,* 465 U.S. 1 (1984); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.,* 460 U.S. 1 (1983); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395 (1967). Moreover, in the *Prima Paint* case, this Court specifically rejected the argument advanced by Respondent—that the federal court is not bound to apply the Act in a diversity case. *Prima Paint, supra,* 388 U.S. at 404-05.

The Court of Appeals' adoption of a state law standard for vacating an award, and its complete disregard of the federal statute of limitations, is described in the Petition. In the Opposition, Respondent merely characterizes this case as "unimportant" and totally disregards the issue of the statute of limitations. To the contrary, this case is important and worthy of this Court's review, as underscored by the Opposition:

> 1. The Court of Appeals studiously avoided application of the federal statute of limitations, for which no defense is offered by Respondent;
>
> 2. The Court of Appeals nullified the parties' contractual commitment to "final and binding" arbitration, in disregard of numerous decisions of this Court and plain statutory commands;

---

[1] If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made . . .

9 U.S.C. Section 9 (1954).

3. The Court of Appeals reached through the numerous federal legal standards that stood in the way of a particular result, and vacated an arbitration Award never shown by any competent evidence to be improper.

Petitioner is aware that this Court does not grant petitions for certiorari merely to correct error. Petitioner submits that this case provides an appropriate opportunity for this Court to resolve a conflict in the Circuits,[2] to remind the lower courts of their duty to implement federal statutory law,[3] and to answer a fundamental federal question concerning the Federal Arbitration Act.[4]

Respectfully submitted,

JOHN A. FRASER, III
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MCI TELECOMMUNICATIONS CORPORATION
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Counsel for Petitioner

August 27, 1993

---

[2] *See* Petition at pp. 6-7, n.5.

[3] *See* Petition at pp. 9, 11.

[4] *See* Petition at pp. 9-11.